

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Investigation by the Department of Telecommunications  
and Energy on its own Motion into the Appropriate Pricing,  
based upon Total Element Long-Run Incremental Costs,  
for Unbundled Network Elements and Combinations of  
Unbundled Network Elements, and the Appropriate Avoided  
Cost Discount for Verizon New England, Inc.  
d/b/a Verizon Massachusetts' Resale Services in the  
Commonwealth of Massachusetts

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D.T.E. 01-20

**HEARING OFFICERS' RULING ON MOTION TO STRIKE  
TESTIMONY FILED BY VERIZON NEW ENGLAND, INC.  
D/B/A VERIZON MASSACHUSETTS**

January 4, 2002

**I.     INTRODUCTION**

On May 8, 2001, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") and AT&T Communications of New England, Inc. ("AT&T") filed their direct cases with the Department of Telecommunications and Energy ("Department") in Part A of this docket. In accordance with the procedural schedule issued in this docket, rebuttal testimony was to be filed by July 18, 2001, and surrebuttal testimony was to be filed by December 17, 2001.

On December 17, 2001, Verizon moved to strike portions of the rebuttal testimony of Mr. Mark L. Stacy, filed on July 18 on behalf of Allegiance Telecommunications of Massachusetts, Inc., Covad Communications Company, El Paso Networks, LLC, and Network Plus, Inc. (collectively, the "CLEC Coalition") ("Motion"). The CLEC Coalition filed comments opposing the Motion ("Opposition") on December 20, 2001.

**II.    POSITIONS OF THE PARTIES**

**A.     Verizon**

Verizon states that Mr. Mark Stacy does not specifically criticize Verizon's loop conditioning work times in his rebuttal testimony, but rather incorporates by reference the testimony on this issue filed by different witnesses in another docket, specifically, D.T.E. 98-57 Phase III ("Phase III") (Motion at 1). However, Verizon states that the record from Phase III

has not been incorporated into this proceeding, and that no motion has been filed requesting such action. Recognizing the Department's authority to take notice of a previous proceeding, Verizon contends that, even if such a motion had been filed, it would be inappropriate to grant such a motion because, Verizon maintains, it is inappropriate for the CLEC Coalition to decide not to refile testimony from another proceeding and then to bootstrap outdated material from another proceeding (id.). Accordingly, Verizon moves to strike the portions of Mr. Stacy's testimony that incorporates testimony from Phase III on the issue of loop condition work times (id. at 2). Alternatively, if the Department denies its Motion, Verizon requests an opportunity to respond to this material (id.).

B. The CLEC Coalition

The CLEC Coalition urges the Department to deny Verizon's Motion. The CLEC Coalition maintains that Verizon's Motion ignores the Hearing Officers' May 18, 2001 ruling in this docket on the CLEC Coalition's Motion to Strike Verizon Testimony and for Extension of Time to File Rebuttal Testimony ("May 18 Ruling"), which, according to the CLEC Coalition, allows parties to incorporate by reference testimony from another proceeding (Opposition at 1-2). More specifically, the CLEC Coalition notes that it filed a motion on May 14, 2001 to strike those portions of Verizon's direct case pertaining to xDSL and line sharing rates, which included loop conditioning and work times, arguing that xDSL rates had been fully litigated in Phase III (id.). The CLEC Coalition points out that the May 18 Ruling denied its motion holding that pursuant to the Department's procedural rules parties have the opportunity to include as evidence in this docket portions of the record on any cost issue addressed in Phase III without expending further resources to recreate testimony (id. at 2). Thus, the CLEC Coalition states that in accordance with the Department's procedural rules and the May 18 Ruling, Mr. Stacy's rebuttal testimony incorporated by reference the testimony submitted in Phase III regarding Verizon's loop conditioning and work times (id.). Granting Verizon's Motion, the CLEC Coalition contends, would deny the CLEC Coalition the opportunity to include portions of the Phase III record in this docket, and would also require the CLEC Coalition to expend further resources to recreate the Phase III testimony, which is what the May 18 Ruling determined was not required (id.).

The CLEC Coalition also urges the Department to deny Verizon's alternative request for an opportunity to respond to Mr. Stacy's testimony should its Motion be denied (Opposition at 3). The CLEC Coalition insists that the problem Verizon now faces is of its own making (id.). The CLEC Coalition argues that Verizon could have moved to strike the allegedly improper material during the five-month period since Mr. Stacy's rebuttal testimony was filed, and, had its Motion been denied, Verizon would have had ample time to respond in its surrebuttal testimony (id.). Even assuming the five-month delay was reasonable, the CLEC Coalition claims that Verizon could have filed conditional surrebuttal testimony to be made part of the record if Verizon's Motion was denied (id. at n.6). Instead, the CLEC Coalition states that Verizon waited until the date it filed surrebuttal testimony to file its Motion, and the CLEC

Coalition maintains that Verizon should not be rewarded, and the CLEC Coalition disadvantaged, for its conduct (*id.*).

Lastly, if the Department permits Verizon to supplement its surrebuttal testimony, the CLEC Coalition asserts that it will need additional time – the amount of which cannot be determined until after Verizon files additional testimony – to prepare for the upcoming hearings<sup>1</sup> (Opposition at 3). Therefore, the CLEC Coalition suggests that a procedural conference be held after Verizon files additional testimony (*id.*).

### III. ANALYSIS AND FINDINGS

Pursuant to 220 C.M.R. § 1.10(3), any party may offer to incorporate by reference matter contained in the record of one proceeding into a separate proceeding.<sup>2</sup> Incorporation by reference is a fairly common practice in Department proceedings; however, incorporation of material by reference is at the Department's discretion and requires a party to request the Department to incorporate specific materials. Our May 18 Ruling in no way modified this Department requirement, and, as Verizon correctly notes, the Phase III materials referenced in Mr. Stacy's rebuttal testimony have not been incorporated into this proceeding, nor has the CLEC Coalition filed a motion to do so. But, we find that the CLEC Coalition is not precluded from submitting a motion to incorporate until the record has closed.<sup>3</sup> In fact, the Department routinely considers requests to incorporate material from one proceeding during the evidentiary hearings of a separate proceeding.

Here, there is no question that the CLEC Coalition will seek to incorporate by reference the testimony from Phase III concerning loop conditioning and work times into the record of

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<sup>1</sup> According to the procedural schedule in this docket, hearings begin on January 7, 2002. Mark Stacy is scheduled to testify on January 16.

<sup>2</sup> 220 C.M.R. § 1.10(3) states in pertinent part:

Any matter contained in any records, investigations, reports and documents in the possession of the Department of which a party or the Department desires to avail itself as evidence in making a decision, shall be offered and made part of the record in the proceeding. Such records ... may be offered in evidence by specifying the report, document or other file containing the matter so offered.

<sup>3</sup> Even when the record is closed, a party may seek to reopen the record as long as a final decision is still pending. *See* 220 C.M.R. § 1.11(8), noting motions to reopen the record upon showing good cause may be filed in accordance with 220 C.M.R. § 1.04(5).

this proceeding, and we remind the CLEC Coalition that Department procedure requires a motion to incorporate the Phase III testimony regarding loop conditioning and work times to be made, preferably at the time it marks Mr. Stacy's pre-filed rebuttal testimony as an exhibit for hearing. Of course, Verizon may oppose the CLEC Coalition's request to incorporate, and may also request that the Department expand the materials to be incorporated to include the entire record on loop conditioning and work times from Phase III, including Verizon's testimony responding specifically to the testimony that Mr. Stacy references. Consequently, we deny Verizon's motion to strike that portion of Mr. Stacy's pre-filed rebuttal testimony that references the Phase III materials.

We also deny Verizon's alternative request for an additional opportunity to respond to the Phase III materials that Mr. Stacy references in his testimony. We agree with the CLEC Coalition that the problem Verizon now faces is of its own making. Verizon was on notice, as of July 18, 2001, of the CLEC Coalition's intent to incorporate the Phase III material, and the five-month interval between the filing of rebuttal testimony and surrebuttal testimony was more than sufficient for Verizon to prepare a response, conditional or otherwise. It was Verizon's decision to omit any response in its surrebuttal testimony to the materials at issue, and to wait until the day surrebuttal testimony was due before filing its Motion. Moreover, Verizon presented no basis whatsoever for its delay in filing its Motion, and granting Verizon's request would only further delay the start of evidentiary hearings, which we are not prepared to do under the present circumstances. Accordingly, we conclude it is inappropriate to grant Verizon additional time to supplement its surrebuttal testimony and hereby deny Verizon's request.

As noted above, Verizon may request to incorporate the entire Phase III record concerning loop conditioning and associated work times so that the record in this proceeding is more complete as to these issues. Additionally, assuming that materials on loop conditioning and associated work times from Phase III are incorporated, in whole or in part, into the record of this proceeding, we do not preclude Verizon from presenting evidence at the evidentiary hearing regarding these materials.<sup>4</sup>

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<sup>4</sup> We note that Verizon asserts that the material the CLEC Coalition seeks to have incorporated into this proceeding is outdated; however, Verizon provides nothing in its Motion to support this conclusion. Moreover, even assuming this material is outdated, this would not prevent this material from being incorporated into the record for this proceeding but would impact the weight which the Department affords this material.

III. RULING

Accordingly, after due consideration, the Hearing Officers find that the motion to strike testimony, or in the alternative, for additional time to respond, of Verizon New England, Inc. d/b/a Verizon Massachusetts is hereby denied.

Under the provision of 220 C.M.R. § 1.06(6)(d)(3), any aggrieved party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation by January 10, 2002, at 5:00 p.m. A copy of this Ruling must accompany any appeal. Any response to any appeal must be filed by January 15, 2002, at 5:00 p.m.

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/s/  
Marcella Hickey  
Hearing Officer

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Tina W. Chin  
Hearing Officer

Date: January 4, 2002